UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ROBERTO L. CRUZ, individually,

Plaintiff,

v. Case No: 2:17-cv-6-FtM-38MRM

QUICKEN LOANS, INC.,

Defendant.
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OPINION AND ORDER[1]

This matter comes before the Court on Defendant Quicken Loans Inc.'s Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), or Alternatively, to Stay the Case (Doc. 19) filed on February 27, 2017. Plaintiff responded on March 17, 2017 (Doc. 24), to which Defendant replied on April 3, 2017 (Doc. 27). For the reasons set forth below, the request to transfer venue is granted.

BACKGROUND

On January 3, 2017, plaintiff Roberto L. Cruz (Plaintiff or Cruz) filed a one-count Complaint for relief, alleging that Defendant Quicken Loans, Inc. (Defendant or Quicken) violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, by sending 319 unauthorized text messages to Plaintiff's cellular phone using an "automatic

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telephone dialing system" (ATDS), as that term is defined by the TCPA, 47 U.S.C. § 227(a)(1). (Doc. 1).

As alleged in Plaintiff's Complaint, on or about April 20, 2015, Cruz requested that Quicken send him via text message weekly and daily updates for mortgage rates.[2] (Doc. 1, ¶ 16). The text messages stated: "Reply HELP for help, Reply STOP to cancel." (*Id.* at ¶ 18). Plaintiff applied for and received a mortgage to purchase a property which closed on or about July 30, 2015. (*Id.* at ¶ 19).

After obtaining the mortgage, on August 10, 2015, Plaintiff replied to Quicken's text by sending the message, "STOP." (*Id.* at ¶ 21). On August 19, 2015, Plaintiff alleges that he called Quicken, spoke to a live person, and instructed Quicken to stop texting him. (*Id.* at ¶ 23). Plaintiff believes and alleges that his "STOP" text and phone call to Quicken served to revoke his consent for Quicken to send text messages to him on his cellular phone using an ATDS. (*Id.* at ¶¶ 22, 24). Despite this, Quicken continued to send Plaintiff text messages with daily and weekly rate updates. (*Id.* at ¶ 25). From the time period of August 11, 2015 through November 4, 2016, Quicken sent Plaintiff 319 text solicitation messages using an ATDS, for which Plaintiff replied "STOP" 263 times. (*Id.* at ¶ 26).

In the instant Motion, Quicken requests that the case be transferred to the Eastern District of Michigan, Detroit (where it is headquartered) because Plaintiff agreed to an Email and Mobile Policy that included a mandatory forum selection clause. In support of

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[2] An example of Quicken's text solicitation message:

> Received from 26293 on Fri Nov 04, 2016 12:00 PM
> Message: QL Rates 30yr 3.5% (3.746% APR) 15yr 2.75% (3.181% APR) Get Started (800) 561-6355 More http://po.st.aHsMZC Reply HELP for help, Reply STOP to unsubscribe

(Doc. 1, ¶ 1).

transfer, Quicken has provided the declaration of Amy Courtney, a Senior Data Analyst at Quicken, along with certain exhibits. (Doc. 19-1). Included as an exhibit to the Declaration is Quicken's Mobile Messaging Policy (the "Policy"), which states that "[b]y texting the five-digit U.S. short code 26293 you acknowledge and agree to the terms and conditions provided in this policy and fully and unconditionally authorize Quicken Loans Inc. and its service providers to respond to your mobile device or cell phone, even if you your [*sic*] telephone number is listed on any federal, state or corporate do-not-call registry." (Doc. 19-3, p. 5). The Policy contained the following forum selection clause:

> By using this service, you agree that the terms stated herein shall apply to you and are incorporated by reference into any communication, and that any disputes pertaining to this service shall be governed by and construed in accordance with the laws of the State of Michigan, without giving effect to any principles of conflicts of law. You agree that any action at law or in equity arising out of your use of Quicken Loans Mobile Messaging or relating to these terms and conditions may only be filed only in the state or federal courts located in Michigan. Consent to these term is not required as a condition to purchase a good/service.

(Doc. 19-3, p. 5). Alternatively, in the event that the Court declines transfer, Quicken seeks a stay of this case pending an appeal in the D.C. Circuit Court that may resolve essential elements of Plaintiff's TCPA claim in Quicken's favor. *ACA International v. FCC*, No. 15-1211.

Plaintiff disagrees with transfer, arguing that: (1) Defendant has failed to offer any evidence that Plaintiff signed and is bound by the Policy; (2) even if Plaintiff is bound by the Policy, the Policy (and its forum selection clause) terminated when he unsubscribed from Quicken's messaging service on August 10, 2015, thereby revoking his consent; (3) the Policy is a permissive forum selection clause; and (4) the forum selection clause is ambiguous, and must be construed against Quicken.

DISCUSSION

"For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought[.]" 28 U.S.C. § 1404(a). A district court has broad discretion in deciding whether to transfer an action to a more convenient forum. *See Testa v. Grossman*, No. 5:15-cv-321, 2015 WL 6153743, at *2 (M.D. Fla. Oct. 19, 2015). " When the parties to litigation have agreed to a valid forum-selection clause, "a district court should ordinarily transfer the case to the forum specified in that clause." *Atl. Marine Contr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013). Forum selection clauses are presumptively valid. *Krenkel v. Kerzner Intern. Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009).

Here, the Court must first determine whether the conduct in this case is encompassed within the Policy. Plaintiff concedes that the forum selection clause restricts litigation to courts in Michigan in two instances: (1) where the action arises from the "use of Quicken Loans Mobile Messaging"; and (2) where the action "relat[es] to these terms and conditions." (Doc. 24, at 11). But Plaintiff argues that this action arises from *Quicken's* conduct in sending text messages that violated the TCPA, which is Defendant's use of the text messaging system, not Plaintiff's. The Court disagrees. Plaintiff alleges in his Complaint that he did in fact sign up to receive text solicitation messages from Quicken, began using the messaging service for a period of time before revoking his consent repeatedly over a period of months.[3] The allegations surely involve Plaintiff's

[3] Plaintiff's argument that Defendant has failed to offer any evidence that Plaintiff signed and is bound by the Policy belies Plaintiff's own allegations in the Complaint that he requested Quicken send him text messages on August 10, 2015, and that he confirmed such request via text message. (Doc. 1, ¶¶ 2, 16). And Defendant has offered evidence showing that when confirming Plaintiff's subscription to the text messaging service, he would have had to agree to Quicken's Email and Mobile Policy, with a link to the complete policy. (Doc. 19-1).

use of the mobile messaging service and the Court does not find any ambiguity in the clause. And Plaintiff agreed that any action at law or in equity arising from his use of the mobile messaging service may *only* be filed in the state or federal courts of Michigan. *See* *Ocwen Orlando Holdings Corp. v. Harvard Property Trust, LLC*, No. 07–13920, 2008 WL 2002513, at *1 (11th Cir. May 12, 2008) (Clear, strong language "dictat[ing] an exclusive forum for litigation under the contract," demonstrates the mandatory nature of the forum selection clause in question.) (quoting *Global Satellite Commun. Co. v. Starmill U.K. LTD.*, 378 F.3d 1269, 1272 (11th Cir. 2004)); *see also* *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1262 n.24 (11th Cir. 1999). Thus, upon examination of the materials submitted, the Court concludes that the Policy contains a valid and enforceable forum selection clause specifying that this action must be brought in federal court in Michigan.

Having determined that this action arises from Plaintiff's use of the mobile messaging service, and is therefore governed by the forum selection clause, the Court must next determine whether this forum selection clause is valid. Generally, "[f]orum-selection clauses are presumptively valid and enforceable unless the plaintiff makes a 'strong showing' that enforcement would be unfair or unreasonable under the circumstances." *Krenkel*, 579 F.3d at 1281. To do so, Plaintiff must illustrate that one of the four *Lipcon* factors is applicable: (1) the Agreement's formation was induced by fraud or overreaching; (2) Plaintiff would be deprived of its day in court because of inconvenience or unfairness; (3) the chosen law would deprive Plaintiff of a remedy; or (4) enforcement of the clause would contravene public policy. *Krenkel*, 579 F.3d at 1281 (citing *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1296 (11th Cir. 1998)).

Plaintiff fails to address any of these factors. Instead, Plaintiff argues that the alleged TCPA violations are outside the Policy and therefore the clause is inapplicable. Here, the Court has already determined that this action arises from the Policy. The only issue, then, is whether Plaintiff can illustrate that one of the four *Lipcon* factors is applicable, allowing the Court to reason that the forum selection clause should not be upheld. Because Plaintiff fails to meet this burden, the Court finds that the forum selection clause is valid and governs this action. Consequently, the Court will transfer this action to the Michigan federal court.

Plaintiff's argument that the Policy terminated when he unsubscribed from the messaging service and therefore Quicken should be estopped from invoking the forum selection clause does not compel a different result. Although the Court agrees that a party may revoke consent to receive text messages by sending an opt-out message, *Legg v. Voice Media Group, Inc.*, 20 F. Supp. 3d 1370, 1378 (S.D. Fla. 2014), the Court cannot find as a matter of law at this time that revocation actually occurred. The Court understands that Plaintiff has alleged that he revoked consent in his Complaint, but as Quicken points out in its Answer, the allegation is a conclusion of law and Quicken has otherwise not admitted that revocation occurred. (Doc. 18, ¶ 22). The mere fact that Plaintiff alleges that he revoked consent does not preclude Quicken from looking to the Policy for purposes of the instant Motion, and therefore Quicken not estopped from invoking the forum selection clause.[4]

Accordingly, it is now

[4] Because the Court grants the transfer request, it does not reach the stay request, which can be raised for resolution in the transferee court.

ORDERED:

Defendant Quicken Loans Inc.'s Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), or Alternatively, to Stay the Case (Doc. 19) is **GRANTED** to the extent that the Clerk is directed to **transfer** this matter to the Eastern District of Michigan, Detroit Division for all further proceedings.

DONE and **ORDERED** in Fort Myers, Florida this 26th day of April, 2017.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: All Parties of Record